

STATEMENT OF THE CASE

The State of Indiana appeals the trial court's grant of a motion to suppress filed by James Anthony Mitchell. Mitchell moved to suppress evidence obtained during a warrantless search of Mitchell's person following the traffic stop of a vehicle in which he was a passenger. The sole issue presented for our review is whether the trial court erred when it granted Mitchell's motion to suppress.

We reverse.¹

FACTS AND PROCEDURAL HISTORY

On May 21, 1999, Indiana State Troopers stopped a vehicle on Interstate 64 driving 78 miles per hour in a 65 mile per hour zone. Mitchell was a backseat passenger in the car. After Mitchell exited the vehicle, one officer recognized Mitchell as the same individual he had stopped the month before on Interstate 65. On that previous occasion, Mitchell had been arrested with nine grams of cocaine in his anus. The officer had also learned since that time that Mitchell was a known drug trafficker. After recognizing Mitchell, the officer asked him if he could do a brief pat down search of his person for weapons. Mitchell agreed, and the officer conducted the pat down. No weapons were located on Mitchell during the search.

Thereafter, the vehicle's owner gave consent to search the vehicle. A K-9 unit on the scene indicated the presence of narcotics in the vehicle. Upon investigation, officers found residue amounts of marijuana scattered throughout the front and back seats of the vehicle as well as other contraband. One officer then ordered Mitchell to place his hands

¹ We heard oral argument on September 18, 2000, in the Warrick County Judicial Center in Boonville.

on the front of the patrol car. The officer proceeded to conduct a pat down search of Mitchell's person for narcotics. When the officer patted Mitchell's buttocks, he felt a hard object in his anal area. The officer asked Mitchell if the object he felt was crack cocaine and Mitchell admitted that it was. The officer handcuffed Mitchell, pulled down his pants and removed from Mitchell's anus a plastic baggie containing more than three grams of crack cocaine. Mitchell was then placed under arrest.

The State charged Mitchell with Dealing in Cocaine, a Class A felony. On August 26, 1999, Mitchell filed a motion to suppress evidence and statements obtained during the search of his person arguing that the search was illegal. On that same date, the court held an evidentiary hearing on the motion to suppress. The parties subsequently filed briefs in support of and in opposition to the motion. The trial court granted Mitchell's motion to suppress on November 9, 1999. After the trial court denied a motion to correct error filed by the State, the State initiated this appeal.²

DISCUSSION AND DECISION

The State challenges the trial court's grant of Mitchell's motion to suppress evidence obtained during the warrantless search of his person. Specifically, the State asserts that the search can be sustained under the "search incident to arrest" exception to the warrant requirement. We agree with the State.

In reviewing a motion to suppress, we do not reweigh the evidence, but determine if there is substantial evidence of probative value to support the trial court's ruling. State v. Aynes, 715 N.E.2d 945, 949 (Ind. Ct. App. 1999). We look to the totality of the

² The State subsequently filed its motion to dismiss without prejudice, which the trial court granted on February 17, 2000.

circumstances and consider all uncontroverted evidence together with conflicting evidence that supports the trial court's decision. Id.

The Fourth Amendment to the United States Constitution protects both privacy and possessory interests by prohibiting unreasonable searches and seizures. Hanna v. State, 726 N.E.2d 384, 388 (Ind. Ct. App. 2000). Searches and seizures that occur without prior judicial authorization in the form of a warrant are per se unreasonable, unless an exception to the warrant requirement applies. Conwell v. State, 714 N.E.2d 764, 766 (Ind. Ct. App. 1999). The State bears the burden of proving that a warrantless search falls within one of the narrow exceptions to the warrant requirement. State v. Friedel, 714 N.E.2d 1231, 1237 (Ind. Ct. App. 1999).

When evaluating the propriety of a warrantless search under the Fourth Amendment, we accept the trial court's factual findings unless they are clearly erroneous. Sebastian v. State, 726 N.E.2d 827, 829 (Ind. Ct. App. 2000), trans. denied. Findings of fact are clearly erroneous where the record lacks any facts or reasonable inferences to support them. Id. at 829-30. However, the ultimate determination whether there is probable cause is reviewed de novo. Id. at 830.

Incident to a lawful arrest, the arresting officer may conduct a warrantless search of the arrestee's person and the area within his or her immediate control. Santana v. State, 679 N.E.2d 1355, 1359 (Ind. Ct. App. 1997) (citing Chimel v. California, 395 U.S. 752 (1969)). Under the search incident to arrest exception, the initial arrest must be lawful. Culpepper v. State, 662 N.E.2d 670, 675 (Ind. Ct. App. 1996), trans. denied. That is to say, probable cause to search or to arrest is still required even though the

circumstances fall within a warrant exception. Id. Probable cause for arrest exists where at the time of arrest the officer has knowledge of facts and circumstances which would warrant a man of reasonable caution to believe a suspect has committed the criminal act in question. Id. A police officer's subjective belief as to whether he has probable cause to arrest a defendant has no legal effect. Sebastian, 726 N.E.2d at 830. Instead, the police officer's actual knowledge of objective facts and circumstances is determinative. Sears v. State, 668 N.E.2d 662, 668 n.8 (Ind. 1996).

In this case, officers had probable cause to arrest Mitchell prior to the search of his person.³ Officers found residue amounts of marijuana scattered throughout the front and back seats of the vehicle in which Mitchell was a passenger. Officers also found common drug paraphernalia including unfilled “philly blunts.” Record at 202. “Philly blunts” are made by taking the paper off of cigars and filling the paper with marijuana instead of tobacco. Record at 202. Fabric softener sheets are often used by drug traffickers to mask the odor of narcotics. Officers immediately recognized Mitchell as the same individual whom they had arrested the month before for drug trafficking. Indeed, they noted that Mitchell was engaged in a similar method of operation as when he had been arrested before by traveling with others on a one-day trip between Indianapolis and Owensboro, Kentucky. Record at 157-59, 161-62. Although none of these facts standing alone would support a finding of probable cause, all of the facts taken together would warrant a man of reasonable caution to believe that Mitchell, at the very least, had

³ Mitchell does not challenge the propriety of the initial stop of the vehicle or the initial pat down search of his person for weapons. Neither does Mitchell challenge the consensual search of the vehicle in which he was a passenger.

committed the criminal act of possession of marijuana.⁴ Officers had probable cause to arrest Mitchell.

Despite the trial court's correct analysis and finding of probable cause, the trial court erroneously concluded that, because officers failed to arrest Mitchell until after the search of his person revealed cocaine in his anus, the warrantless search did not fall within the search incident to arrest exception. Rather, the critical inquiry and determination is whether officers had probable cause to arrest prior to and independent of the search, not whether the arrest actually occurred before the search. "As with many search cases and probable cause issues, the timing of events and the officer's knowledge are critical in determining the validity of the search." Sears, 668 N.E.2d at 666. "So long as probable cause exists to make an arrest, the fact that a suspect was not formally placed under arrest at the time of the search incident thereto will not invalidate the search."⁵ Santana, 679 N.E.2d at 1360 (citing Rawlings v. Kentucky, 448 U.S. 98, 111 (1980) ("Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa.")); see also Jackson v. State, 588 N.E.2d 588, 590 (Ind. Ct. App. 1992); Jones v. State, 467 N.E.2d 1236, 1240 (Ind. Ct. App. 1984). To be incidental to a lawful arrest, the search must be conducted substantially contemporaneous

⁴ It is of no moment that Mitchell was not ultimately charged with possession of marijuana. The facts and circumstances of which the arresting officer has knowledge that give him probable cause to believe a crime has been committed, need not be the same crime with which the defendant is ultimately charged. Moody v. State, 448 N.E.2d 660, 663 (Ind. 1983); see also Sears, 668 N.E.2d at 667 n.10.

⁵ This, of course, assumes that the fruits of the search of the defendant's person were not necessary to support probable cause to arrest the defendant. See Rawlings, 448 U.S. at 111 n.6. "It is axiomatic that an incident search may not precede an arrest and serve as part of its justification." Sibron v. New York, 392 U.S. 40, 63 (1968); Smith v. Ohio, 494 U.S. 541, 543 (1990).

with the arrest and be confined to the immediate vicinity of the arrest. Sears, 668 N.E.2d at 667.

Those standards were met here. After officers discovered marijuana and other contraband in the vehicle in which Mitchell, a known drug trafficker, had been traveling, they ordered Mitchell to stand near the front of the patrol car. An officer then performed a pat down search of Mitchell for narcotics discovering a hard object in Mitchell's anal area. The officer asked Mitchell if the object he felt was crack cocaine, and Mitchell admitted that it was. After handcuffing Mitchell and removing the cocaine from his anus, officers arrested him. Under the circumstances, the search of Mitchell's person was incident to a lawful arrest.

The trial court erred when it granted Mitchell's motion to suppress evidence seized as a result of the warrantless search of his person. Accordingly, we reverse.

Reversed.

BAILEY, J., and MATTINGLY, J., concur.